

Please
handle this volume
with care.

The University of Connecticut
Libraries, Storrs

hbl, stx

KF 4155.V57 1960

Did the court interpret or amend?



3 9153 00738171 0

57/1960



Digitized by the Internet Archive
in 2012 with funding from
LYRASIS members and Sloan Foundation

<http://archive.org/details/didcourtinterpre00virg>

41.
VE
19

DID THE COURT INTERPRET OR AMEND?

The Meaning of the Fourteenth Amendment, in Terms of a State's power to operate Racially Separate Public Schools, as defined by the Courts.

Prepared and distributed as a public service by THE VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, as the fifth in a series of vital statements on State and Federal relations.

IN the six years that have passed since *Brown v. Board of Education*, some of the intense passions set off by that fateful decision have tended to subside. It is possible now, as it was not possible earlier, to examine the Supreme Court's opinion in a spirit of objectivity, free—or at least, comparatively free—of the emotional clouds of despair, on the one hand, and jubilation, on the other, with which the opinion was greeted at first.

Whatever the opinion's merits may have been in the field of sociology (which is none of this Commission's concern), the opinion's palpable faults as a matter of law become steadily more apparent. This paper is addressed to matters of law. It is our earnest contention that the Supreme Court erred grievously in the *Brown* case; that here the Court stepped across the line that divides constitutional interpretation from constitutional amendment.

In the fifteen years immediately following adoption of the Fourteenth Amendment in 1868, seven court cases were brought to test the continuing power of the States to operate racially separate public schools. In each of these cases, Negro plaintiffs sought to obtain new rights of "equal protection." Precisely the same arguments that were to be presented to the Supreme Court in *Brown* were presented to the highest courts of Ohio, Indiana, Nevada, California, and New York seventy or eighty years earlier. Two Federal Circuit Courts also considered the identical question.

These seven cases ought not to be disdained as "ancient history." When it comes to answering the question posed in 1952 by the Supreme Court itself—what was the intention of the framers and adopters of the Amendment in terms of separate schools?—these seven cases are fresh, pertinent, and completely relevant.

Reasonably minded men will agree, we believe, after reading these cases, that it never was the intention of those who framed and adopted the Fourteenth Amendment to prohibit to the States the power to operate racially separate schools. If this be true, it follows that the Supreme Court exceeded its rightful authority in the *Brown* case, for a State power, once defined and universally sanctioned, may be prohibited to the State only by amendment of the Constitution itself.

This is how we see it. Far more importantly, this was long ago the view of able judges; it was the view of men who knew the background best.

JAMES J. KILPATRICK, Chairman,
Publications Committee,

May 17, 1960.

THE MEANING OF THE
FOURTEENTH AMENDMENT

IN TERMS OF A STATE'S POWER TO OPERATE
RACIALLY SEPARATE PUBLIC SCHOOLS,
AS DEFINED BY THE COURTS



DID THE COURT *INTERPRET OR AMEND?*

The Meaning of the Fourteenth Amendment, in
Terms of a State's power to operate Racially
Separate Public Schools, as defined by the Courts.

 GREAT danger to constitutional government lies in popular misunderstanding of its precise methods and purposes. In many ways the small minority who would treat the United States Constitution as an archaic hindrance to their centralist purposes, and willingly would discard or subvert it, pose less threat than that far greater number who vocally support the Constitution, but who unwittingly approve or participate in actions that tend to destroy its protective features.

One striking instance of this is to be found in the so-called school segregation cases. There are other instances, of course, but none perhaps as conspicuously in the public view nor so clear in dangerous implications. It is not the purpose of the Virginia Commission on Constitutional Government to argue the merits and demerits of racial segregation in any form; the problem is as old and as complex as man himself. It is our purpose, however, to show that the Supreme Court, in order to accomplish what it presumably thought was a worthwhile end, committed a breach of basic constitutional limitations.

John C. Calhoun said that just as laws are written to restrain men, so constitutions are written to restrain governments. The framers of the United States Constitution had this goal in mind when they drafted the basic compact by which the States are bound in Union. They had fired the crucible of the Revolution with a great political ideal, that governments derive their just powers only from the consent of the governed; and newly freed from the tyrannies of the British crown, they did not propose to embrace a system that would permit fresh tyranny of domestic origin. Thus, out of the reservoir of the States' inherent political powers, certain specific powers were to be delegated to the central government, but all powers not so delegated were to be retained, to the end that the people themselves, acting in their respective States, might control their own destinies.

It was recognized, of course, that in time their compact, i.e., the Constitution, might require amendment, but it was recognized also that it was as necessary to protect the Constitution from being amended by the very government it was designed to control as it was to establish controls on that government initially. Consistent with this grand plan for a federated union, Article V was drafted carefully to preserve ultimate control of the Constitution in the States themselves. The agreement was that no change would be made in this most basic of all law without the consent of a full three-fourths of the States. Amendments could not even be proposed without the approval of two-thirds of each House of Congress, or as an alternative, without the approval of two-thirds of the States.

The purpose of this deliberately restrictive procedure was plain: it was to protect a minority of the people, in a minority of the States, from the tyranny of simple majority rule. The framers realized, with magnificent vision, that similarities among the States would take care of themselves; the framers'

concern was that the *differences* among the States be respected. And when it came to their fundamental law—to the Constitution itself—they wanted to be positive that changes in the compact were not made easily or impulsively.

An understanding of the design and purpose of Article V is essential to an understanding of the position advanced in this paper. A Constitution does not consist of empty words. A Constitution has meaning only as its words have meaning, and the plain meaning of Article V was, and is, that the States alone have the power to amend their compact.

But words, it is said, often have different meanings, and it may be necessary to have them construed or interpreted by resort to the judicial function. Where, then, does “interpretation” of the Constitution end, and where does “amendment” begin? Granted that courts have power to interpret; how is one to know when the necessary power to interpret has been corrupted into a usurped power to amend?

The question answers itself if we return to the point of beginning: Words have meanings. And the words of a contractual instrument, as applied to particular events or conditions in the minds of the parties at the time the instrument is agreed to, have a permanent meaning. Such a meaning is necessarily fixed. It becomes, in fact, the instrument itself; to alter it would be to alter the instrument itself. This is true even if some disagreement among the parties themselves led or forced them to have the Courts interpret the instrument and judicially establish this meaning for them. If that original meaning, however determined, is to be abandoned, then it must be by consent of the parties and the instrument must be formally amended.

Coming then to the point at hand we find that some of the words and phrases of the Fourteenth Amendment are, on the surface, rather nebulous. When men speak of a State’s “abridging a citizen’s privileges or immunities,” or of a State’s denying

any person "due process of law," or of a State's denying to any person within its jurisdiction the "equal protection of the laws," it is fair enough to inquire what these apparently ambiguous phrases mean.

To answer these questions, one must go to the primary source. What did these words and phrases mean, as applied to particular situations, *to the framers who drafted the Amendment and to the States that ratified it*? If the meaning and intent can be established on this basis, the search is done. That meaning, so fixed, actually becomes and is the Constitution; and no effort to change that meaning can be legal unless it comes through the amendatory process provided in Article V. To contend otherwise would be to nullify the very purpose of the Constitution—the control of government.

This is not an argument of disgruntled Southerners; it is an established maxim of law echoed in every accepted legal treatise on the subject. It is succinctly stated in Judge Cooley's great work on Constitutional Limitations:

A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. *A Constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion.* It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rule as inheres in the principles of the common law.

. . .

A court or legislature which should allow a change in public sentiment to influence it in giving construction to a written con-

stitution not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; *and if its course could become a precedent, these instruments would be of little avail.* The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for Bills of Rights in our fundamental laws lies mainly in the danger that the legislature will be influenced by temporary excitements and passions among the people to adopt oppressive enactments. What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. *The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a Court has occasion to pass upon it.* [Emphasis supplied]

What “meaning of the Constitution” are we searching for here? We are undertaking to find the meaning of the Fourteenth Amendment to the framers who drafted it and to the States that ratified it, in terms of (1) the *power* of a State to maintain racially separate public schools, and (2) the *right* of an individual to attend a school not segregated by law.

This is a survey, it will be seen, to determine a boundary line—the line that separates the powers of government, or of society, from the rights of the individual citizen. If the metaphor may be pursued for a moment, it will be seen that some striking analogies can be found with the law of real property. Just as the precise bounds of wilderness tracts may remain uncertain for a time, until it is necessary to fix them exactly, so the delineation of constitutional rights and powers may remain for a while obscure. It is only when some specific question is raised that the surveyors are brought in with chain and transit, that titles are examined with care, and that suit is filed to determine precise metes and bounds. Thus A is told that his authority extends to this point, and no farther; and B is told that his rights extend to this point, and no farther, and by obedience to

this lawful process, order is established among contending parties. The line becomes fixed. It cannot be changed thereafter except by consent of the parties.

Precisely this lawful process was followed long ago in settling the boundary here under study. Prior to adoption of the Fourteenth Amendment, the States individually possessed a vast domain of political power; it was as if they held all land stretching to some unmapped mountain range. The Amendment reduced this holding drastically. Now the States were prohibited from doing certain things they had had power to do before. The effect of this constriction, obviously, was to expand the area of liberty possessed by the individual in his relationship to the State.

At once a specific question arose. Plainly, the States prior to 1868 had possessed the power, and had exercised the power, to operate racially separate public schools. With the execution of this constitutional deed, had the power now been taken from them? Just as plainly, the Negro prior to 1868 had possessed no right to attend school on a non-segregated basis. In this metaphorical transfer of political property, had he now acquired that right?

So the surveyors were called in, and the title examiners were called in, and the questions were answered and the lines were fixed in the only orderly way these boundaries can be fixed, and that is by judicial determination.

Within fifteen years after adoption of the Fourteenth Amendment, while the understandings and intentions and circumstances of the instrument were fresh in everyone's mind, seven cases were decided on this specific question of right and power. Five of these decisions were written by the highest courts of Ohio, Indiana, Nevada, California and New York. Two of them were written by Federal courts, one in Ohio, the other in Louisiana. These cases so clearly established the mean-

ing of the Fourteenth Amendment in regard to racially separate public schools that the Supreme Court of the United States later could dismiss the question as settled beyond further argument.

In OHIO:

The first of these cases was *Garnes v. McCann*, 21 Ohio 198, decided in December, 1871. Ohio's school laws at this time required that each township or district have one or more common schools for its children. However, these laws also classified and separated pupils by race and permitted adjoining townships or districts, if they had only a few Negro children, to form a *joint* school district and operate one school for the colored children in both original districts. Plaintiff's children, Negroes, were refused instruction in the established white school in the district in which they resided, and they refused to attend the school established in the joint district for colored children. Garnes sought a writ of mandamus to compel admission of his children to the white school. Basing his case squarely on the Fourteenth Amendment, his attorney presented these arguments:

[The] school law discriminates against colored children.

The statute providing for the classification of school children according to color, or at least that part of it which would, as in this instance, compel colored children to go outside of the limits of the subdistrict in which they reside, to attend school, and, in certain contingencies, debar them from the privileges of common schools altogether, cannot be enforced without abridging the privileges of citizens within the meaning of the amendment to the Constitution. Again, the enforcement of this law would be a violation of this amendment, because it would compel a certain class of citizens to submit the management and control of their school fund to a board not chosen by themselves, while it secures to another class the privilege of having their proportion of the school

fund appropriated and managed by the electors elected by the voters of the subdistrict. In this particular the statute secures to one class a privilege it denies to another.

In *Van Camp v. Board of Education of Logan*, (9 Ohio St. 406), our school law was held to be one of classification and not of exclusion. Class legislation was then permitted—color could then be made a basis of classification, as well as age or sex, without violating the Constitution of the United States, but not so since the amendment.

The relator claims the right to send his children to the public school which is kept in the district in which he resides. It is the only school within the district. Our school law would drive his children forth to some other district where there is maintained a separate school for colored children. To refuse this writ would be to enforce a law which denies to him the privileges that belong to other citizens living in the same district. They possess the advantages and conveniences of having their children instructed in a school located within the limits of their subdistrict, and under the control of officers elected by themselves. To deny to the relator these advantages and conveniences, is to abridge his privileges, since the denial is placed solely on the ground that he is colored.

The citizen is bound to give obedience, and the government must furnish protection. The relator “cannot be a citizen to obey, and an alien to demand protection.”

Mr. Justice Day, speaking for a unanimous court, reviewed the facts and then said this:

. . . During all the time the plaintiff insisted on having his children instructed in subdistrict number nine, in the school established for white children, an equally good school was open for them in the joint district established for colored children, as provided by law, where they could enjoy the full advantages and privileges of a public common school.

The defendants, in refusing to recognize the children of the plaintiff as pupils in the school of subdistrict number nine, acted in good faith, and without any design of depriving them of a common school education; but they claim that they may properly insist that the children of the plaintiff shall be educated in the

school established for colored children in the joint district, and that they rightfully refuse them instruction in the school for white children in subdistrict number nine.

It is quite apparent from this state of the case, that the proceeding is brought, not because the children of the plaintiff are excluded from the public schools, but to test the right of those having charge of them to make a classification of scholars on the basis of color. This is the principal question in the case, and we propose to consider it without reference to the question made as to the proper parties to the proceeding, for, in the view we take of the case, this becomes unnecessary.

The system of public education in Ohio is the creature of the constitution and statutory laws of the State. The constitution provides that "it shall be the duty of the General Assembly to pass suitable laws * * * * to encourage schools and the means of instruction." (Art. 1, sec. 7.) Again, it provides that "The General Assembly shall make such provision, by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State." (Art. 6, sec. 2.)

It is left to the discretion of the General Assembly, in the exercise of the general legislative power conferred upon it, to determine what laws are "suitable" to secure the organization and management of the contemplated system of common schools, without express restriction, except that "no religious or other sect or sects shall ever have any exclusive right to, or control of, any part of the school funds of the State." (Art. 6, sec. 2.)

Under these powers and requirements of the constitution, the General Assembly has attempted to organize, by "suitable laws," an "efficient system of common schools," for the purpose (as expressed in the 63d section of the act of 1853) "of affording the advantages of a free education to all the youth of this State."

. . .

As to the validity of the provisions of this section we express no opinion further than is necessary to the determination of this case, in which it clearly appears that the clauses applicable to it did not operate to exclude the colored children of that locality from a common school education equal to that of the other youth.

Were this not the fact, more doubt would arise. But where both classes of children, as in the case before us, enjoy substantially equal advantages in different schools, and the separate school for colored children is clearly authorized by the statute, the only doubt that arises is as to the constitutional validity of the law which authorizes such separation on the basis of color: and that is the real question in this case.

The constitution confers the legislative power of the State upon the General Assembly, and "that includes all legislative power which the object and purposes of the State government may require; and we must look to other provisions of the constitution to see how far, and to what extent, legislative discretion is qualified or restricted." (Per Gholson, J. in *Baker v. The City of Cincinnati*, 11 Ohio St. 542.) The constitution contains no restrictions upon the "legislative discretion," in regard to the classification of the youth of the State for school purposes. Those, then, enjoying equal privileges with all, cannot complain of a want of power to regulate the manner in which such privileges shall be enjoyed, for in this, as in all cases, the legislature has the power to regulate, for the general good, the mode in which parties shall enjoy their rights, without coming in conflict with any of those constitutional principles which are established for the protection of private rights.

But the question of legislative power to authorize the classification of the youth of the State for school purposes on the basis of color, has been determined by the Supreme Court of this State, both under the present constitution and that of 1802. The 25th section of the bill of rights in the latter contains express provisions guaranteeing "equal participation" to all in the schools endowed, in whole or in part, from the revenue arising from donations made by the United States for the support of schools. But it was held in *The State ex rel. &c. v. The City of Cincinnati*, (19 Ohio 178), that, inasmuch as "the whole subject of organizing and regulating schools is very properly left to the General Assembly, in the exercise of its legislative powers," an act to authorize the establishment of separate schools for the education of colored children was constitutional; and it was said by Hitchcock, C. J., in that case, that, "as a matter of policy, it is unquestionably better that the white and colored youth should be placed in separate schools, and

that the school fund should be divided to them in proportion to their numbers." After this expression of opinion by that eminent judge, we might at least hesitate to conclude, that the classification of the youth of the State for school purposes, on the basis of color, was an unauthorized or unreasonable exercise of the legislative discretion in the regulation of the public schools of the State.

But in *Van Camp v. The Board of Education of Logan*, (9 Ohio St. 406), the question under consideration was expressly determined by this court, upon the original statute, which, so far as material to the question, was the same as that under which the classification was made in this case. In that case the legislative power of classification on the basis of color was sanctioned, and it was held, that, inasmuch as the statute "is a law of *classification* and not of *exclusion*," colored children "are not, *as of right*, entitled to admission into the common schools set apart under said act for the instruction of white youths." The application, however, made in that case, of the principle settled by it, we are not required to approve or disapprove in this, for in that case there had not been, as there was in this, a separate school established for colored children.

It would seem, then, that under the constitution and laws of this State, the right to classify the youth of the State for school purposes, on the basis of color, and to assign them to separate schools for education, both upon well recognized legal principles and the repeated adjudications of this court, is too firmly established to be now judicially disturbed.

But it is claimed that the law authorizing the classification in question contravenes the provisions of the 14th Amendment of the Constitution of the United States, and is, therefore, abrogated thereby.

The section of the amendment relied upon is as follows:

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law,

nor deny to any person within its jurisdiction the equal protection of the laws.”

Unquestionably all doubts, wheresoever they existed, as to the citizenship of colored persons, and their right to the “equal protection of the laws,” are settled by this amendment. But neither of these was denied to them in this State before the adoption of the amendment. At all events, the statutes classifying the youth of the State for school purposes on the basis of color, and the decisions of this court in relation thereto, were not at all based on a denial that colored persons were citizens, or that they are entitled to the equal protection of the laws. It would seem, then, that these provisions of the amendment contain nothing conflicting with the statute authorizing the classification in question, nor the decisions heretofore made touching the point in controversy in this case. Nor do we understand that the contrary is claimed by counsel in the case. But the clause relied on, in behalf of the plaintiff, is that which forbids any State to “make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

This involves the enquiry as to what privileges or immunities are embraced in the inhibition of this clause. We are not aware that this has been as yet judicially settled. The language of the clause, however, taken in connection with other provisions of the amendment, and of the Constitution of which it forms a part, affords strong reasons for believing that it includes only such privileges or immunities as are derived from, or recognized by, the Constitution of the United States. A broader interpretation opens into a field of conjecture limitless as the range of speculative theories, and might work such limitations of the power of the States to manage and regulate their local institutions and affairs as were never contemplated by the amendment.

If this construction be correct, the clause has no application to this case, for all the privileges of the school system of this State are derived solely from the constitution and laws of the State. If the General Assembly should pass a law repealing all laws creating and regulating the system, it cannot be claimed that the 14th Amendment could be interposed to prevent so grievous an abridgement of the privileges of the citizens of the State, for they would thereby be deprived of privileges derived from the State, and not of privileges derived from the United States.

But we need not now further discuss this point, as the true meaning and exact limits of the clause in question are not necessarily involved in this case. For, conceding that the 14th Amendment not only provides equal securities for all, but guarantees equality of rights to the citizens of a State, as one of the privileges of citizens of the United States, it remains to be seen whether this privilege has been abridged in the case before us. The law in question surely does not attempt to deprive colored persons of any rights. On the contrary it recognizes their right, under the constitution of the State, to equal common school advantages, and secures to them their equal proportion of the school fund. It only regulates the mode and manner in which this right shall be enjoyed by all classes of persons. The regulation of this right arises from the necessity of the case. Undoubtedly it should be done in a manner to promote the best interests of all. But this task must, of necessity, be left to the wisdom, and discretion of some proper authority. The people have committed it to the General Assembly, and the presumption is that it has discharged its duty in accordance with the best interests of all. At all events, the legislative action is conclusive, unless it clearly infringes the provisions of the Constitution.

At most, the 14th Amendment only affords to colored citizens an additional guaranty of equality of rights to that already secured by the constitution of the State.

The question, therefore, under consideration is the same that has, as we have seen, been heretofore determined in this State, that a classification of the youth of the State for school purposes, upon any basis which does not exclude either class from equal school advantages, is no infringement of the equal rights of citizens secured by the constitution of the State.

We have seen that the law, in the case before us, works no substantial inequality of school privileges between the children of both classes in the locality of the parties. Under the lawful regulation of equal educational privileges, the children of each class are required to attend the school provided for them, and to which they are assigned by those having the lawful official control of all. The plaintiff, then, cannot claim that his privileges are abridged on the ground of inequality of school advantages for his children. Nor can he dictate where his children shall be instructed, or what

teacher shall perform that office, without obtaining privileges not enjoyed by white citizens. *Equality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school. Any classification which preserves substantially equal school advantages is not prohibited by either the State or Federal Constitution, nor would it contravene the provisions of either.* There is, then, no ground upon which the plaintiff can claim that his rights under the Fourteenth Amendment have been infringed. [Emphasis supplied]

The action of the defendants was warranted by the authority conferred by the General Assembly in the exercise of its constitutional powers. "Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the Constitution imposes, and not those implied restrictions, which, resting on theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives." Cooley's Con. Lim. [*129].

In NEVADA:

In 1872, the Supreme Court of Nevada had before it the question of whether racial classification in public schools contravened the provisions of the Fourteenth Amendment. (*State ex rel Stoutmeyer v. Duffy*, 7 Nevada 342) The colored plaintiff raised some arguments identical to those advanced by Negro petitioners in 1953 and 1954, viz:

. . .

V. The separation of the children in the public schools, on account of race or color, is in the nature of caste, and is a violation of equality. It is clear that the trustees may classify scholars according to age and sex, for these distinctions are inoffensive and recognized as legal; or according to their moral and intellectual qualifications, because such a power is necessary to the government of schools. But the legislature cannot assume, without individual examination, that an entire race possess certain moral or intellectual qualities, which renders it proper to place them all in

a school by themselves. Nor is it any good answer to say that separate schools may be established for their instruction, because such separate schools are not the public schools designed by the constitution.

VI. The attempt to discriminate against and to abridge and impair the rights of colored citizens, comes with bad taste from the State of Nevada. It will be remembered that this State was organized in the midst of a great war, fought for the enfranchisement of the slaves and for the establishment of the great doctrine that all men are free and equal, and that, in that contest, this State enthusiastically supported that doctrine. It will be further remembered, that this State, with the utmost alacrity, ratified the Thirteenth, Fourteenth and Fifteenth amendments to the United States Constitution, the object and intent of which were to declare and fix the absolute equality of all men before the law.

The case was decided on other points, but the Nevada court's broad answer to the foregoing argument is clear:

. . . While on the one hand they may not deny to any resident person of proper age an equal participation in the benefits of the common schools; and while in the present case upon the facts presented, the defendants should have admitted the relator into the public school in question; yet, on the other hand, it is perfectly within their power to send all blacks to one school, and all whites to another; or, without multiplying words, to make such a classification, whether based on age, sex, race, or any other existent condition, as may seem to them best. *Van Camp v. Board of Education of Logan*, 9 O. S. 406; *Roberts v. Boston*, 5 Cush. 108.

Whether it be well or ill to classify or divide, on either or all of the conditions suggested, or upon any other, is entirely within the discretion of the trustees, acting intelligently within their powers.

In CALIFORNIA:

Apparently unwilling to accept these precedents, a California resident two years later challenged the legality of school segregation under the Fourteenth Amendment. *Ward v. Flood*,

48 California 36 (1874). He, too, presaged events to come by reference to sociological and international implications, as follows:

This is a case which can hardly be argued, any further than its statement alone is an argument. It is admitted now, by the highest masters of thought, even among theologians, that the existence of God himself cannot be proved, nor the duty of children to love and cherish their parents, nor that of general benevolence. But we know that God exists, and that these duties are of imperative obligation. We know that persons of African descent have been degraded by an odious hatred of caste, and that the Constitution of the United States has provided that this social repugnance shall no longer be crystallized into a political disability. This was the object of the Fourteenth Amendment, and its terms are above being the subject of criticism. We know, too, that a State must always have laws equal to its obligations. This was always true as a proposition of municipal law. The world is still ringing with the echoes of its announcement as a proposition of the public law of nations, by the highest tribunal that ever existed in the world, which has just closed its session at Geneva.

The Supreme Court of California, speaking through Chief Justice Wallace, met the issue head on:

Nor is it perceived that the State law in question, in obedience to which the respondent proceeded, is obnoxious to those provisions of the Fourteenth Amendment to the Federal Constitution securing the privileges and immunities of citizens of the United States, and protecting all persons against the deprivation of life, liberty or property, without due process of law. That Amendment, so far as claimed to be material to the question, is as follows: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

. . .

The last clause of so much of the Amendment as has been

recited, however, forbids the State to "deny to any person within its jurisdiction the equal protection of the laws," and it remains to inquire if the statute of the State, providing for a system of common schools, in so far as it directs that schools shall be maintained for the education of colored children separate from those provided for the education of white children, be obnoxious to this portion of the Federal Constitution.

The opportunity of instruction at public schools is afforded the youth of the State by the statute of the State, enacted in obedience to the special command of the Constitution of the State, directing that the Legislature shall provide for a system of common schools, by which a school shall be kept up and supported in each district, at least three months in every year, etc. (Art. 19, Sec. 3.) The advantage or benefit thereby vouchsafed to each child, of attending a public school is, therefore, one derived and secured to it under the highest sanction of positive law. It is, therefore, a right—a legal right—as distinctively so as the vested right in property owned is a legal right, and as such it is protected, and entitled to be protected by all the guarantees by which other legal rights are protected and secured to the possessor.

The clause of the Fourteenth Amendment referred to did not create any new or substantive legal right, or add to or enlarge the general classification of rights of persons or things existing in any State under the laws thereof. It, however, operated upon them as it found them already established, and it declared in substance that, such as they were in each State, they should be held and enjoyed alike by all persons within its jurisdiction. The protection of law is indeed inseparable from the assumed existence of a recognized legal right, through the vindication of which the protection is to operate. To declare, then, that each person within the jurisdiction of the State shall enjoy the equal protection of its laws, is necessarily to declare that the measure of legal rights within the State shall be equal and uniform, and the same for all persons found therein—according to the respective condition of each—each child as all other children—each adult person as all other adult persons.

. . .

But we do not find in the Act of April, 1870, providing for a system of common schools, which is substantially repeated in the

Political Code now in force, any legislative attempt [to exclude Negroes]; nor do we discover that the statute is, in any of its provisions, obnoxious to objections of a constitutional character. It provides in substance that schools shall be kept open for the admission of white children, and that the education of children of African descent must be provided for in separate schools.

In short, the policy of separation of the races for educational purposes is adopted by the legislative department, and it is in this mere policy that the counsel for the petitioner professes to discern "an odious distinction of caste, founded on a deep-rooted prejudice in public opinion." But it is hardly necessary to remind counsel that we cannot deal here with such matters, and that our duties lie wholly within the much narrower range of determining whether this statute, in whatever motive it originated, denies to the petitioner, in a constitutional sense, the equal protection of the laws; and in the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than of the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense.

A question similar to this came before the Supreme Judicial Court of the State of Massachusetts in 1849 (*Roberts v. The City of Boston*, 5 Cushing R. 198), and was determined by the Court in accordance with the views just expressed by us. That was an action on the case brought by a colored child against the city to recover damages claimed by reason of her exclusion from a public school as a pupil. It appeared that primary schools to the number of about one hundred and sixty were maintained for the instruction of children of both sexes between five and seven years of age, and that of these schools two were appropriated to the exclusive instruction of colored children, and the residue to the exclusive instruction of white children. It also appeared that the plaintiff had been excluded from the primary school nearest her father's residence, which was a school devoted exclusively to the instruction of white children, and that the school appropriated to the education of colored children nearest her father's residence was about a fifth of a mile more distant therefrom than was the school from which she had been excluded. The Constitution of the State

of Massachusetts contained the following clauses, which were relied upon by the counsel for the plaintiff to show that the separation of colored from white children for educational purposes was not justified by law. (Part 1, Art. 1:) "All men are born free and equal, and have certain natural, essential and inalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties, that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Art. 6: No man nor corporation or association of men, have any other title to obtain advantages or particular and exclusive privileges distinct from those of the community, than what arise from consideration of services rendered to the public." * * *

It will be seen that the language of the Massachusetts Constitution prohibiting "particular and exclusive privileges," was fully as significant, to say the least, in its bearing on the general question in hand as is that of the Fourteenth Amendment of the Federal Constitution, securing "the equal protection of the laws."

The argument of the counsel for the plaintiff in the Massachusetts case, much like that of the counsel for the petitioner here, was that the separation of the races for educational purposes, "is the occasion of inconveniences to colored children, to which they would not be exposed if they had access to the nearest public schools; it inflicts upon them the stigma of caste; and although the matters taught in the two schools may be precisely the same, a school exclusively devoted to one class must differ essentially, in its spirit and character, from that public school known to the law, where all classes meet together in equality."

The opinion of the Court, delivered by Mr. Chief Justice Shaw, maintained the rightful authority of the school committee, to separate the colored children from the white children in the public schools of the city of Boston, and in the course of the opinion, the learned Chief Justice remarked as follows:

"It will be considered that this is a question of power, or of the legal authority of the committee intrusted by the city with this department of public instruction; because if they have the legal authority, the expediency of exercising it in any particular way is exclusively with them. The great principle advanced by the learned and eloquent advocate of the plaintiff, is that by the Constitution

and laws of Massachusetts, all persons, without distinction of age or sex, birth or color, origin or condition, are equal before the law. This, as a broad general principle, such as ought to appear in a declaration of rights, is perfectly sound; it is not only expressed in terms, but pervades and animates the whole spirit of our Constitution of free government. But when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law, for their maintenance and security. What those rights are, to which individuals in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions. . . .

“The committee, apparently upon great deliberation, have come to the conclusion that the good of both classes of schools will be best promoted by maintaining the separate primary schools for colored and for white children, and we can perceive no ground to doubt that this is the honest result of their experience and judgment. It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded on a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence; and we cannot say that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment.”

We concur in these views, and they are decisive of the present controversy. In order to prevent possible misapprehension, however, we think proper to add that in our opinion, and as the result

of the views here announced, the exclusion of colored children from schools where white children attend as pupils, cannot be supported, except under the conditions appearing in the present case; that is, except where separate schools are actually maintained for the education of colored children; and that, unless such separate schools be in fact maintained, all children of the school district, whether white or colored, have an equal right to become pupils at any common school organized under the laws of the State, and have a right to registration and admission as pupils in the order of their registration, pursuant to the provisions of subdivision fourteen of section 1,617 of the Political Code.

In INDIANA:

That same year the Supreme Court of Indiana was called upon to decide the issue. (*Cory et al. v. Carter*, 48 Ind. 327, 1874). The court's opinion by Mr. Justice Buskirk represented extensive research into the field of State and Federal relations, and the court's conclusions and citations of authority merit respectful attention today.

Having decided that the Constitution of the State of Indiana did not prohibit racial segregation in the public schools, the Court said:

. . . the next step is to find out the extent of its qualification or change by the Constitution of the United States.

Section 2 of article 4 of the Constitution of the United States declares, that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

This section, at an early date, received a construction in the case of *Corfield v. Coryell*, which has ever since been recognized and approved. It relates only to "those privileges and immunities which are fundamental," and which may all be comprehended under the following heads: "Protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

In the *Slaughter-House Cases*, the Supreme Court of the United States said: "Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction." It did not compel the State, into which the citizen of another State removed, to allow him the exercise of the same rights which he enjoyed in the State from which he removed. *Corfield v. Coryell*, 4 Wash. C. C. 371; *Slaughter-House Cases*, 16 Wal. 76, 77; *Bradwell v. The State*, 16 Wal. 130; *Ward v. Maryland*, 12 Wal. 430; *Conner v. Elliott*, 18 How. 591; *Brown v. State of Md.*, 12 Wheat. 448, 449; *People v. Brady*, 40 Cal. 198; Story Const., secs. 1805, 1806; Cooley Const. Lim. 15, 16, 397; Potter's Dwarris on Stat. 525, 526; *Sears v. The Board, etc.*, 36 Ind. 267; *The Jeffersonville, etc., R. R. Co. v. Hendricks*, 41 Ind. 48.

It is well settled by repeated decisions of the Federal and State courts, that with the exception of the limitations imposed upon the powers of the States by section 10 of article 1 of the Constitution of the United States, the several States were left as before the Federal Union was formed, with full power to declare the rights of their citizens, without interference from the Federal Government.

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remain unaltered and unimpaired, except so far as they were granted to the government of the United States. In one of the States of the Union, colored children were entitled to admission into schools for white children, and to be taught with white children, and yet, if a person residing in such State should remove into some other State, where such right is denied, the right so exercised in the State from which the person removed would be lost, because it was not one of those fundamental rights which accompany the person, but a domestic regulation exclusively within the constitutional and legislative power of each State, and to be regarded in the nature of a domestic regulation necessary for the good of the whole people, or which the good of the people of one State, in their sovereign judgment, required to be different from the regulation in another, as best

securing "the general comfort and prosperity of the State." Story Const., secs. 1353, 1409; Cooley Const. Lim. 573, 574; 2 Kent Com. 71; 2 Op. Att'y Gen'l, 426; *Commonwealth v. Alger*, 7 Cush. 84; *The City of New York v. Miln*, 11 Pet. 139; *Slaughter-House Cases*, 16 Wal. 62; *Bradwell v. The State*, 16 Wal. 130; *Thayer v. Hedges*, 22 Ind. 282; Potter's Dwarrris on Stat. 352, 452, 455, 461.

It is very plain that the Tenth Amendment of the Constitution of the United States cannot receive such construction as will aid the claim of the appellee. It declares, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people;" and the power to fix the qualifications of the citizen of the State, and to establish his rights in the State, is one of the powers expressly reserved to the State by this amendment; for there is no express limitation of the power of the States in the Federal Constitution in this respect, as it then stood, and such limitation could not exist without express mention. Rawle Const. 84, 87; Story Const., sec. 1904; Works of Webster, vol. 3, p. 322; Cooley Const. Lim. 19; Federalist, 140; *Slaughter-House Cases*, 16 Wal. 70, 71, 72, 73; *Barron v. Mayor, etc.*, 7 Pet. 243; *Smith v. State of Md.*, 18 How. 71; *Pervear v. The Commonwealth*, 5 Wal. 475; *Barker v. The People*, 3 Cow. 686; *James v. The Commonwealth*, 12 S. & R. 220; *Jane v. Commonwealth*, 3 Met. Ky. 18; *Lincoln v. Smith*, 27 Vt. 336; *Warren v. Paul*, 22 Ind. 276; *The State, ex rel. Lakey, v. Garton*, 32 Ind. 1.

That the views hereinbefore expressed correctly represent the relative powers of the Federal and State governments at the close of the great civil war, and until after the ratification of the amendments to the Constitution of the United States, which followed the termination of that contest, cannot, we think, be successfully controverted.

We next proceed to determine whether such amendments, or either of them, have worked a change, and, if they have, to what extent.

The Thirteenth Amendment was proposed by Congress on the 1st day of February, 1865, and declared by the Secretary of State to have been ratified December 18th, 1865. It declares that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall

exist within the United States, or any place subject to their jurisdiction;" and "Congress shall have power to enforce this article by appropriate legislation."

This amendment was to prevent any question in the future as to the effect of the war and the President's proclamation of emancipation upon slavery; and its obvious purpose was to forbid all shades and conditions of African slavery. *Slaughter-House Cases*, 16 Wal. 68, 69.

It had no other office, and its real effect was more for the future than the present. As to the matter of social and political rights, the African was left just where section 37, article 1, of our State constitution left him, and subject to all the inconveniences and burdens incident to his color and race, except his former one of servitude. He was a person whose place and office, in the body politic, was yet to be designated and established. He possessed no political rights, in the usual and proper sense of that term, through, or had none conferred by, this enactment. . . .

The Fourteenth Amendment to the Federal Constitution was proposed by Congress July 16th, 1866, and declared by the Secretary of State to have been ratified July 28th, 1868. It consists of several sections, but section 1 is the only one necessary to this examination. It declares, that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This section can better be understood or construed, by dividing and considering it in four paragraphs or clauses, the last, however, being a mere re-statement of what precedes it:

First. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

In the *Slaughter-House Cases*, the Supreme Court of the United States says this is a declaration "that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making all per-

sons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the Negro can admit of no doubt. The phrase, 'subject to its jurisdiction,' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States." It recognizes and establishes a "distinction between citizenship of the United States and citizenship of a State." "Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual." Hence, a Negro may be a citizen of the United States and reside without its territorial limits, or within some one of the territories; but he cannot be a citizen of a State until he becomes a *bona fide* resident of the State.

Second. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

This clause does not refer to citizens of the States. It embraces only citizens of the United States. It leaves out the words "citizen of the State," which is so carefully used, and used in contradistinction to citizens of the United States, in the preceding sentence. It places the privileges and immunities of citizens of the United States under the protection of the Federal Constitution, and leaves the privileges and immunities of citizens of a State under the protection of the State constitution. This is fully shown by the recent decision of the Supreme Court of the United States in the *Slaughter-House Cases*, 16 Wal. 36.

Mr. Justice Miller, in delivering the opinion of the court and in speaking in reference to the clause under examination, says:

"It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out

when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

“Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

“If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.”

The same learned judge, in the further examination of the second clause, says:

“It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal Government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal Government. Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal Government?

And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

"All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the legislative power of the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases" (these judgments sustained the validity of the grant, by the legislature of Louisiana, of an exclusive right, guarded by certain limitations as to price, etc., to a corporation created by it, for twenty-five years, to build and maintain slaughter-houses, etc., and prohibited the right to all others, within a certain locality), "would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment.

"The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal Governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt. *We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.*" [Emphasis supplied]

Third. "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

This clause is the same contained in the Fifth Amendment to the Constitution of the United States, but there applied to the action of the Federal Government, and here placed as a check upon the States. But the constitution of our State contains, and perhaps those of all the States contain just such a provision, so that it expresses no new principle, but is the old rule in force since the foundation of the State governments. It prohibits the States from depriving any person of life, liberty, or property, except "in due course of legal proceedings, according to those rules and forms which have been established" by the State, "for the protection of private rights." *Cooley Const. Lim.* 356, 357; *Westervelt v. Gregg*, 12 N. Y. 209.

Fourth. "Nor deny to any person within its jurisdiction the equal protection of the laws."

In regard to this clause, the Supreme Court of this State, in *The State v. Gibson*, 36 Ind. 389, says it "seems to have been added in the abundance of caution, for it provides in express terms what was the fair, logical, and just implication from what had preceded it, and that was, that the persons made citizens by the amendment should be protected by the laws in the same manner, and to the same extent, that white citizens were protected."

In the case of *The State v. Gibson*, *supra*, this court was called upon to place a construction upon the Fourteenth Amendment to the Constitution of the United States. It was claimed in that case, that such amendment had abolished the laws of this State prohibiting the intermarriage of Negroes and whites. We held that marriage was a purely domestic institution, and subject to the exclusive control of the State; that such amendment had not conferred on the Federal Government any power to interfere with the institution of marriage, and that such amendment had not enlarged the powers of the Federal Government nor diminished those of the States. We then said:

"The Fourteenth Amendment contains no new grant of power from the people, who are the inherent possessors of all power, to the Federal Government. It did not enlarge the powers of the Federal Government, nor diminish those of the States. The in-

hibitions against the States doing certain things have no force or effect. They do not prohibit the States from doing any act that they could have done without them. * * * The only effect of the amendment under consideration was to extend the protection and blessings of the Constitution and laws to a new class of persons. When they were made citizens they were as much entitled to the protection of the Constitution and the laws as were the white citizens, and the States could no more deprive them of privileges and immunities than they could citizens of the white race. Citizenship entitled them to the protection of life, liberty, and property, and the full and equal protection of the laws. Nor has the ratification of this amendment in any manner or to any extent impaired, weakened, or taken away any of the reserved rights of the States, as they had existed and been fully recognized by every department of the national government from its creation."

What was then intended to be expressed was, that the Fourteenth Amendment had not delegated to the Federal Government the power to regulate and control the domestic institutions of a State. As will be hereinafter shown, it imposes some limitations upon the powers of the States as to slavery and the equal protection of the rights of citizens of the United States and of the States.

We were then unaided by any judicial construction of the Fourteenth Amendment; and we are gratified to know that the views then expressed have been, in all substantial respects, sustained by the highest judicial tribunal in this country, and the one especially charged with the construction and interpretation of the Federal Constitution. By the solemn decision of that high court, the privileges and immunities belonging to the citizens of the States, as such, rest for their security and protection where they have heretofore rested, with the States themselves.

. . .

How far, then, have the amendments operated to change the constitution of Indiana or imposed limitations or restrictions upon the sovereign power of the State? We answer, in the following particulars:

1. The State cannot in the future, while a member of the Federal Union, change her constitution so as to create or establish slavery or involuntary servitude, except as a punishment for

crimes whereof the party shall have been convicted; thus protecting the new class of citizens, *i. e.*, Negroes and mulattoes, from being again reduced to slavery.

2. The State cannot deny to, or deprive a citizen of the United States, *i. e.*, any Negro or mulatto, of, those national rights, privileges, or immunities which belong to him as such citizen.

3. The State must recognize as its citizen any citizen of the United States, *i. e.*, any Negro or mulatto, who is or becomes a *bona fide* resident therein.

4. The State must give to such, *i. e.*, to such Negro or mulatto, who is or who becomes a *bona fide* resident therein, the same rights, privileges, and immunities, secured by her constitution and laws to her other, *i. e.*, to her white citizens.

In our opinion, such amendments have not in any other respect imposed restrictions or limitations upon the sovereign power of the State. From this it results, that there is no limitation upon the power of the State, within the limits of her own constitution, to fix, secure, and protect the rights, privileges, and immunities of her citizens, as such, of whatever race or color they may be, so as to secure her own internal peace, prosperity, and happiness.

This will preserve in their purity and vigor the structure and spirit of our complex system of government, as it came from the hands of the great and illustrious men who achieved our independence and formed our matchless form of government. Anterior to the adoption of the Federal Constitution, the States existed as independent sovereignties, possessing supreme and absolute power over all questions of local and internal government. To the States the whole charge of interior regulation is left by the Federal Constitution; to them and to the people thereof all powers not expressly, or by necessary implication, delegated to the national government, and not prohibited to the States, are reserved to the States.

. . .

The Federal Constitution does not provide for any general system of education, to be conducted and controlled by the national government, nor does it vest in Congress any power to exercise a general or special supervision over the States on the subject of education. . . .

This system of common schools must consist of many schools in different localities or geographical divisions; and these schools may be of different grades. In some of these localities or divisions there may be school-houses, and in others none. In some the school-house or houses may not be sufficient to accommodate all, and the revenue may not be sufficient to provide for them.

In this system, there ought to be and must be a classification of the children. This classification ought to and will be with reference to some properties or characteristics common to or possessed by a certain number out of the whole; and these classes may be put into and taught in different parts of the same school, or different rooms in the same school-house, or different school-houses, as convenience and good policy may require.

This is too reasonable to admit of question; for it concerns the general good, and does not affect the quality of the privilege, but regulates the manner of its enjoyment.

This being settled, what is there to prevent the classification of children, equally entitled to the privileges of the system of common schools, with reference to difference of race or color, if the judgment of the legislature should hold such a classification to be most promotive of, or conducive to, the good order and discipline of the schools in the system, and the interest of the public?

It being settled that the legislature must provide for the education of the colored children as well as for the white children, we are required to determine whether the legislature may classify such children, by color and race, and provide for their education in separate schools, or whether they must attend the same school without reference to race or color. In our opinion, the classification of scholars, on the basis of race or color, and their education in separate schools, involve questions of domestic policy which are within the legislative discretion and control, and do not amount to an exclusion of either class. In other words, the placing of the white children of the State in one class and the Negro children of the State in another class, and requiring these classes to be taught separately, provision being made for their education in the same branches, according to age, capacity, or advancement, with capable teachers, and to the extent of their *pro rata* share in the school revenue, does not amount to a denial of equal privileges to either, or conflict with the open character of the system required

by the constitution. The system would be equally open to all. The tuition would be free. The privileges of the schools would be denied to none. The white children go to one school, or to certain of the schools in the system of common schools. The colored children go to another school, or to certain others of the schools in the system of the common schools. Or, if there are not a sufficient number of colored children within attending distance, the several districts may be consolidated and form one district. But if there are not a sufficient number within reasonable distance to be thus consolidated, the trustee or trustees shall provide such other means of education for said children as shall use their proportion, according to number, of school revenue to the best advantage. If there be cause of complaint, the white class has as much, if not greater cause than the colored class, for the latter class receive their full share of the school revenue, although none of it may have been contributed by such class; and when districts can not be consolidated so as to form a school, such class is entitled to receive their full share of the school revenue, according to number, which shall be expended for their benefit to the best advantage, a privilege which is not granted to the white class.

In our opinion, there would be as much lawful reason for complaint, by one scholar in the same school, that he could not occupy the seat of another scholar therein at the same time the latter occupied it, or by scholars in the different classes in the same school, that they were not all put in the same class, or by the scholars in different schools, that they were not all placed in one school, as there is that white and black children are placed in distinct classes and taught separately, or in separate schools.

The action of Congress, at the same session at which the Fourteenth Amendment was proposed to the States, and at a session subsequent to the date of its ratification, is worthy of consideration as evincing the concurrent and after-matured conviction of that body that there was nothing whatever in the amendment which prevented Congress from separating the white and colored races, and placing them, as classes, in different schools, and that such separation was highly proper and conducive to the well-being of the races, and calculated to secure the peace, harmony, and welfare of the public; and if no obligation was expected to be or was imposed upon Congress by the amendment, to place the

two races and colors in the same school, with what show of reason can it be pretended that it has such a compelling power upon the sovereign and independent States forming the Federal Union?

We refer to the legislation of Congress relative to schools in the District of Columbia, at the first session of the Thirty-Ninth Congress, and the third session of the Forty-Second Congress.

On the 23d day of July, 1866, the act of Congress, entitled "an act relating to public schools in the District of Columbia," took effect. It requires the cities of Washington and Georgetown to pay over to the trustees of colored schools of said cities such a proportionate part of all moneys received or expended for school or educational purposes in said cities, including the cost of sites, buildings, improvements, furniture, and books, and all other expenditures on account of schools, as the colored children between the ages of six and seventeen years, in the respective cities, bear to the whole number of children, white and colored, between the same ages. Acts sess. 1, 39th Cong. 222.

This was followed at the same session of Congress by an act, entitled "an act donating certain lots in the city of Washington for schools for colored children in the District of Columbia," approved July 28th, 1866, which authorized and required the Commissioner of Public Buildings to convey certain described lots, in the city of Washington, which belonged to the United States, to the trustees for colored schools for the cities of Washington and Georgetown in said District, for the sole use of schools for colored children in that District; the said lots having been designated and set apart by the Secretary of the Interior to be used for colored schools; and the said lots whenever converted to any other use to revert to the United States. Act sess. 1, 39th Cong. 354.

At its 42d session an act was passed, entitled "an act to amend an act entitled 'An act governing the colored schools of the District of Columbia,'" approved March 3d, 1873, which fixes the number of the board of trustees of schools for colored children in the District of Columbia, their mode of appointment, their duties, etc., and authorizes the Governor of the District to appoint a superintendent of schools for colored children, who is to receive a salary of twenty-five hundred dollars annually, for his services, etc., and directs the proportion of school money then due, or afterward to become due, to the board of trustees of colored

schools from the cities of Washington and Georgetown, to be paid to the treasurer of said board, and not to the trustees, as provided in the act of July 23d, 1866. Acts sess. 3, 42d Cong. 260.

This legislation of Congress continues in force, at the present time, as a legislative construction of the Fourteenth Amendment, and as a legislative declaration of what was thought to be lawful, proper, and expedient under such amendment, by the same body that proposed such amendment to the States for their approval and ratification.

We are very clearly of the opinion that the act of May 13th, 1869, is constitutional, and that while it remains in force colored children are not entitled to admission into the common schools which are provided for the education of the white children.

In LOUISIANA:

And what did Federal Circuit Judge Woods, a former Union General, have to say on the question? Referring to his opinion in the case of *Bertonneau v. The Directors of City Schools*, 3 Woods 177 (Federal) La. (1878), we read in part as follows:

The grievance, and the sole grievance, set out in the bill is that complainant's children, being of African descent, are not allowed to attend the same public schools as those in which children of white parents are educated.

Is this a deprivation of a right granted by the Constitution of the United States? The complainant says that the action of the defendants deprives him and his children of the equal protection of the laws, and therefore impairs a right granted to him and them by the Fourteenth Amendment to the Constitution of the United States, and the act of Congress passed to secure the same.

Is there any denial of equal rights in the resolution of the board of directors of the city schools, or in the action of the subordinate officers of the schools, as set out in the bill? Both races are treated precisely alike. White children and colored children are compelled to attend different schools. That is all. The State, while conceding equal privileges and advantages to both races, has the

right to manage its schools in the manner which, in its judgment, will best promote the interest of all.

The State may be of opinion that it is better to educate the sexes separately, and therefore establishes schools in which the children of different sexes are educated apart. By such a policy can it be said that the equal rights of either sex are invaded? Equality of right does not involve the necessity of educating children of both sexes, or children without regard to their attainments or age in the same school. Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the Constitution of the United States. *Equality of rights does not necessarily imply identity of rights.* [Emphasis supplied]

In OHIO:

Federal Circuit Judge Baxter, of Ohio, adopted the same position in giving his charge to the jury in *United States v. Buntin*, 10 Fed. 730 (1882). He said:

The Supreme Court of the State has held that such a classification of the two races is within the constitutional discretion of the legislature, and that the separate education of the whites and blacks in accordance with the terms of the law is no wrong to either. I concur in and adopt this decision as a correct exposition of the Constitution, and instruct you that if there was such a school in the district for the education of colored children, affording substantially the same educational advantages as were afforded by the school from which the prosecuting witness was excluded, and reasonably accessible, it was his duty to have gone there, and the defendant did him no wrong in the exclusion complained of.

In NEW YORK:

The State of New York for some years has prohibited racial segregation in its public schools. This, to be sure, is New York's legislative prerogative. But it is useful to keep in mind that New York maintained racially separate schools long after

ratification of the Fourteenth Amendment, and abandoned this dual system by its own voluntary action and not under compulsion of any court decree.

Among the most significant cases to arise in the period immediately following the amendment's approval was *People ex rel King v. Gallagher*, 93 N. Y. 438 (1883). In pertinent part, New York's highest court said this:

The argument of the appellant's counsel is to the effect that the Fourteenth Amendment, under the laws of this State, giving equal privileges in its common schools to every citizen, confers upon the relator not only the right of equal educational facilities with white children, but that such education shall be furnished at the same time and place with that afforded to any other child, otherwise it is claimed that she is abridged of some "privilege or immunity" which of right belongs to her, or that she is denied the equal protection of the law.

The history of this amendment is familiar to all, and for all of the purposes of this argument may be briefly summarized. At the time of its adoption the colored race had been recently emancipated from a condition of servitude and made citizens of the States. It was apprehended that in some, if not all, of the States of the Union, feelings of antipathy between the races would cause the dominant race, by unfriendly legislation, to abridge the rights of the other, and deny to them equal privileges and the protection of the laws. To guard the previously subject race from the effect of such discrimination, these provisions were made a part of the fundamental law of the land, and their rights were placed under the protection of the Federal Government. Their object has been defined by Mr. Justice Strong in *Ex parte Virginia* (100 U. S. 344), where it is said that "one great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude, in which most of them had previously stood, into perfect equality of *civil rights* with all other persons within the jurisdiction of the States." The same learned judge in *Strauder v. West Virginia* (100 U. S. 306), also says: "It was designed to assure to the colored race the enjoyment of all of the *civil rights* that, under the law, are enjoyed by white persons, and to give that

race the protection of the general government, in that enjoyment, when it should be denied by the States."

It will be observed that the language of the amendment is peculiar in respect to the rights which the State is forbidden to abridge. Although the same section makes all persons born or naturalized in the United States, and subject to the jurisdiction thereof, citizens of the United States and of the State wherein they reside, yet, in speaking of the class of privileges and immunities which the State is forbidden to deny the citizen, they are referred to as the privileges and immunities which belong to them as citizens of the United States. It has been argued from this language that such rights and privileges as are granted to its citizens, and depend solely upon the laws of the State for their origin and support, are not within the constitutional inhibition and may lawfully be denied to any class or race by the States at their will and discretion. This construction is distinctly and plainly held in *The Slaughter-House Cases* (16 Wall. 36), by the Supreme Court of the United States. The doctrine of that case has not, to our knowledge, been retracted or questioned by any of its subsequent decisions. . . .

But we are of the opinion that our decision can also be sustained upon another ground, and one which will be equally satisfactory as affording a practical solution of the questions involved. It is believed that this provision will be given its full scope and effect when it is so construed as to secure to all citizens, wherever domiciled, equal protection under the laws and the enjoyment of those privileges which belong, as of right, to each individual citizen. This right, as affected by the questions in this case in its fullest sense, is the privilege of obtaining an education under the same advantages and with equal facilities for its acquisition with those enjoyed by any other individual. It is not believed that these provisions were intended to regulate or interfere with the social standing or privileges of the citizen, or to have any other effect than to give to all, without respect to color, age or sex, the same legal rights and the uniform protection of the same laws.

In the nature of things there must be many social distinctions and privileges remaining unregulated by law and left within the control of the individual citizens, as being beyond the reach of the legislative functions of government to organize or control.

The attempt to enforce social intimacy and intercourse between the races, by legal enactments, would probably tend only to embitter the prejudices, if any such there are, which exist between them, and produce an evil instead of a good result. (*Roberts v. City of Boston*, 5 Cush. 198.)

As to whether such intercourse shall ever occur must eventually depend upon the operation of natural laws and the merits of individuals, and can exist and be enjoyed only by the voluntary consent of the persons between whom such relations may arise, but this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it is organized and performed all of the functions respecting social advantages with which it is endowed. . . .

If the [complainant's] argument should be followed out to its legitimate conclusion, it would also forbid all classification of the pupils in public schools founded upon distinctions of sex, nationality or race, and which, it must be conceded, are essential to the most advantageous administration of educational facilities in such schools. Seeing the force of these contentions the appellant concedes that discrimination may be exercised by the school authorities with respect to age, sex, intellectual acquirements and territorial location, but he claims that this cannot, under the Constitution, be extended to distinctions founded upon difference in color or race. We think the concession fatal to his argument.

The language of the amendment is broad, and prohibits every discrimination between citizens as to those rights which are placed under its protection. If the right, therefore, of school authorities to discriminate, in the exercise of their discretion, as to the methods of education to be pursued with different classes of pupils be conceded, how can it be argued that they have not the power, in the best interests of education, to cause different races and nationalities, whose requirements are manifestly different, to be educated in separate places? We cannot see why the establishment of separate institutions for the education and benefit of different races should be held any more to imply the inferiority of one race than

that of the other, and no ground for such an implication exists in the act of discrimination itself. . . .

A natural distinction exists between these races which was not created neither can it be abrogated by law, and legislation which recognizes this distinction and provides for the peculiar wants or conditions of the particular race can in no just sense be called a discrimination against such race or an abridgment of its civil rights. The implication that the Congress of 1864, and the State legislature of the same year, sitting during the very throes of our civil war, who were respectively the authors of legislation providing for the separate education of the two races, were thereby guilty of unfriendly discrimination against the colored race, will be received with surprise by most people and with conviction by none. Recent movements on the part of the colored people of the South, through their most intelligent leaders, to secure Federal sanction to the separation of the two races, so far as the same is compatible with their joint occupation of the same geographical territory, afford strong evidence of the wishes and opinions of that people as to the methods which in their judgments will conduce most beneficially to their welfare and improvement. . . .

If regard be had to that established rule for the construction of statutes and constitutional enactments which require courts, in giving them effect, to regard the intent of the law-making power, it is difficult to see why the considerations suggested are not controlling upon the question under discussion.

The question here presented has also been the subject of much discussion and consideration in the courts of the various States of the Union, and it is believed has been, when directly adjudicated upon, uniformly determined in favor of the proposition that the separate education of the white and colored races is no abridgment of the rights of either.

Admittedly State courts of last resort are final judicial authority only as to the meaning of their respective State Constitutions; in all cases involving the United States Constitution, their decisions are subject to review by the Supreme Court of the United States. But, unless and until reversed, decisions of State appellate courts regarding the Federal Constitution are

final, and as none of the foregoing cases was reviewed by the Supreme Court the decisions normally would be considered controlling authority. However, reliance on State court interpretations, even though unreversed, is unnecessary here because the Supreme Court of the United States long ago fixed this boundary line itself—that is, the Court determined, by specific pronouncement, the meaning, intent and effect of the Fourteenth Amendment as regards operation of racially segregated public schools by the States.

In the case of *Plessy v. Ferguson*, 163 U. S. 537, 16 S. Ct. 1138 (1896) the Court was called upon to decide a question concerning segregation in public transportation under the Fourteenth Amendment, but in the process of passing on that question the Court, through Mr. Justice Brown, said:

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the State legislatures in the exercise of their police power. *The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.* [Emphasis supplied]

Then in 1899, the Supreme Court decided a case directly involving segregated schools (*Cumming v. Richmond County Board of Education*, 175 U. S. 528, 20 S. Ct. 197). Not only were the schools in Richmond County segregated, but a con-

siderable difference existed in the financial support which the Board of Education extended toward the high school education of the two races. However, taking note of the fact that by reason of colored high schools in an adjacent community, Negroes had substantially equal opportunities with whites for such an education, the Court declined to interfere with the situation in Richmond County.

Mr. Justice Harlan, who, incidentally, had dissented strongly from the majority view in the *Plessy* case regarding segregation in transportation, wrote the unanimous opinion of the Court in this case. Directing his remarks to the power of States in regard to *education*, he had this to say:

. . . the education of the people in schools maintained by State taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.

Any conceivable doubt on this point was settled beyond dispute in the case of *Gong Lum v. Rice*, 275 U. S. 78, 48 S. Ct. 91 (1927). The problem and the Supreme Court's answer to it is summed up in the following brief quotation from the majority opinion by Mr. Justice Taft.

The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all. . . . Were this a new question, it would call for very full argument and consideration, but we think it is the same question which has been many times decided to be within the constitutional power of the State Legislature to settle without intervention of the Federal courts under the Federal Constitution.

. . . The decision [to separate races] is within the discretion of the

State in regulating its public schools, and does not conflict with the Fourteenth Amendment.”

The judiciary thus performed its *interpretive* function. In the field of public education, the Constitution stood clearly defined and, so far as education is concerned, the people have changed it not one iota.

Did the Supreme Court then have the right to issue the opinion it did in *Brown*? The answer is found by adverting again to the argument advanced in the beginning of this exposition, the truth of which the members of the Supreme Court apparently recognize, albeit only when it suits them.

The Court, referring to the *Brown* case, made this statement which must of necessity be equally applicable to all other Supreme Court decisions regarding the Constitution:

It follows that the interpretation of the Fourteenth Amendment enunciated by this Court . . . is the *supreme law of the land*, and Article VI of the Constitution makes it of binding effect on the States “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Every State legislator and executive and *judicial* officer is solemnly committed by oath taken pursuant to Article VI, Paragraph 3 “*to support this Constitution.*” . . . (*Cooper v. Aaron*) [Emphasis supplied]

The phraseology employed by the Court comes, of course, from Article VI of the Constitution which lists three things only as the “supreme law of the land,” the Constitution itself, laws of the United States made in pursuance thereof, and treaties. A Court decree in itself is neither Constitution, law nor treaty, but merely declaratory of one or more of them. If such a decree is to be accorded the appellation “supreme law of the land” it can only be because in a metaphysical sense it has become and is the thing it declares. In that event, it follows

as night the day that the earlier declarations of the Supreme Court (confirming the meaning of the Fourteenth Amendment as pronounced by the State and lower Federal courts) became and were, to the extent involved, the amendment itself and as such subject to change only as provided for in Article V. Thus the members of the Supreme Court who decided the *Brown* case are wrong either in declaring Supreme Court opinions construing the Constitution to be the "supreme law of the land" or by undertaking to amend the Fourteenth Amendment in a way not countenanced by the Constitution. In either event, the Court, by its fiat and not by amendment of the Constitution under Article V, has effectively seized from the States a substantial portion of their remaining political power.

The Virginia Commission on Constitutional Government invites the renewed consideration of this decision by Americans everywhere, regardless of their personal convictions upon racial separation itself. Soberly, and in no mean spirit, this Commission submits that grave violence is done to the structure of constitutional government, and ominous precedents are set for further invasion of rights and powers, when the Court's action is accepted without sincere and continuing protest.

Richmond, Virginia,
May 17, 1960.

3258 088





University of
Connecticut
Libraries
